final decree recited this order for costs in the following terms:—

"And it is ordered that the costs of the respective first, second, fourth and fifth defendants as between party and party be taxed on the higher scale and paid by the plaintiff to the defendants respectively."

These costs were taxed and the amount found due on taxation was endorsed on the decree in the form of a certificate by the Assistant Registrar.

This I am told by the Assistant Registrar, Ipoh, is the usual practice in the Federated Malay States.

On behalf of the debtor it was contended that this was insufficient and that a final decree should have been drawn for the amount of the allocatur, and until this was done there was no final decree.

English cases were cited but I think that the matter is concluded by the terms of the local legislation, i.e, Civil Procedure Code, section 237, and rule 4 of 1932 (sub-rules 69 and 70) particularly sub-rule 70. In view of these I consider that the point raised by the debtor is bad.

The third objection alleges that the petitioning creditor failed to give the debtor credit for a set-off for costs in an interlocutory appeal in the same proceedings in which the debtor was successful.

The facts are as follows: On the hearing of the appeal the debtor was awarded costs against several of the defendants with the result that there was a debt owing by such defendants jointly and severally to the debtor. After the serving of the bankruptcy petition, but before the notice of 23rd August, an arrangement was come to, to which the debtor was a party by which the costs of the appeal were to be set-off against the costs payable by the debtor to another defendant in the suit as the result of which on 10th August, 1940, satisfaction was entered for the costs of the appeal. In view of this, in my opinion, the objection by the debtor is unfounded.

These were all the objections that were pressed by the debtor except one headed "C" consideration of which was deferred.

Application dismissed.

MAN LEE LOONG KONGSI vs. KWONG LOONG MINING KONGSI & ANOR.

[Civ. Juris. (Murray-Aynsley, J.) Feb. 1, 1940]

Civil Procedure Code (Cap. 7), section 497.—Order to permit boring and prospecting of mining land —On an enquiry as to damages an order under section 497 of the Civil Procedure Code can be made permitting the boring and prospecting of mining land.

The first defendants were sublessees of a mining lease and had made an oral agreement with the plaintiffs as a result of which the plaintiffs had mined part of the lands occupied by the first defendants on terms which included an obligation on the first defendants to supply and work an engine for pumping water in order to enable the plaintiffs to work the land. In other proceedings the second defendant was appointed Receiver and Manager of the business of the first defendants and, soon after such appointment, the second defendant, through his solicitors, gave notice to the plaintiffs that he did not wish to continue the contract. The first defendants afterwards stopped their engine thereby cutting off the water supply required by the plaintiffs to work the land. The plaintiffs sued the defendants for breach of contract and judgment was given in favour of the plaintiffs, the judgment of the Court including an order that an enquiry be held as to the damage suffered by the plaintiffs by reason of the wrongful termination of the agreement. The plaintiffs then applied by summons to proceed with the enquiry and in the course of this enquiry the plaintiffs applied by summons for an order that their consulting engineers be permitted to bore and prospect the land affected by their agreement and to prove and take samples from the said land.

Cases referred to:—

(1) *Dhomey Dhur Ghose v. Radha Vobind Kur* 4 Cal. 117.

(2) *Bennitt v. Whitehouse* 54 E.R. 311.

(3) *Lumb v. Beaumont* 27 Ch. D. 356.

(4) *Cooper v. Ince Hall Co.* (1876) W.N. 24.

H. R. Rix for plaintiffs.

R. D. Hume (with him *J. M. M. Lewis*) for the defendants.

The application was dismissed with costs and the following reasons for decision were afterwards filed:

Murray-Aynsley, J.—The application in this case was a novel one and counsel for the plaintiffs was unable to quote any precedent. It seemed to me that it was rather analogous to the application usually made by defendants for a medical examination of an injured plaintiff. I have always understood and it is the prevailing opinion that the defendants cannot insist on this but refusal may result in an adverse inference.

In the present case the examination desired by the plaintiffs would be of value, not in estimating the amount of tin which the plaintiffs might have extracted, since this depends on the quota for the time being, but for estimating the cost of extracting such part of the quota as might have fallen to the plaintiffs. The cost of the enquiry asked for would however have been very heavy as it would entail borings over the whole mine, and no examination without borings is worth anything. Apart from this I would have been in favour of the plaintiffs' application if I had power to accede to it.

The plaintiffs appealed.

E. D. Shearn (with him *H. R. Rix*) for the plaintiff-appellants.

The Court has found a breach of contract by the defendants in that they dispossessed the plaintiffs and so prevented them from winning tin from the defendants land.

The measure of damage laid down was the loss of profit the plaintiffs would have earned if they had not been dispossessed.

In order to ascertain the amount of this profit it is necessary to bore the defendants land.

The learned Judge in the Court below agreed that boring would be an advantage but he found that there was no precedent which allowed him to make an order.

The learned Judge overlooked section 497 of the Civil Procedure Code. He was wrong in thinking that the case before him was analogous to the application usually made by the defendants for a medical examination of an injured plaintiff because in the case of the examination of an injured plaintiff there is no question of "inspection of **property** which is the subject matter of such suit or as to which any question may arise therein".

He referred to:—

Order L r. 3 of the R.S.C. England; Order XLVII r. 4 of the S.S.; 8th Ed. Sarkar civil procedure, p. 2262; **Dhomey Dhur Ghose v. Radha Vobind Kur**(1); **Bennitt v. Whitehouse**(2); **Lumb v. Beaumont**(3); 5th Ed. Bainbridge on Mines, p. 446; **Cooper v. Ince Hall Co.**(4).

R. D. Hume (with him *J. M. M. Lewis*) for the defendant-respondents:

The results would not justify the inspection by boring—ordinary boring is for dredging propositions or open cast mines—here the appellants were "lampanning." They were merely scraping the surface.

There is power to make the order but it should not be made. The question of quota should be borne in mind. The defendants would not have been able to obtain all the tin in the land.

At the conclusion of the argument the Court of Appeal delivered an oral judgment accepting the submission of appellants' counsel that the application should have been granted under section 497 of the Civil Procedure Code (Cap. 7) and therefore allowing the appeal and making the order for which the plaintiffs had applied in their summons, each party to bear its own costs of the appeal.

Order accordingly.

MAHINDAR SINGH vs. P. P.

[App. Cr. Juris. (Terrell, Ag. C.J.) April 29, 1941]

Criminal Procedure Code (Cap. 6), section 174—Counsel for defence not given opportunity to address Court at the close of case—Irregularity—New trial ordered.

The appellant in this case was charged with voluntarily causing hurt to Gurbachan Singh by means of a Khanda, which used as a weapon of offence was likely to cause death, and thereby committing an offence punishable under section 324 of the Penal Code. He was convicted and sentenced to a fine of $75 or one month's rigorous imprisonment.

He appealed on the ground, **inter alia**, that the learned Magistrate did not give his counsel an opportunity to address the Court.

Held, this constituted an irregularity sufficient to justify an order for a new trial.

Appellant in person.

T. V. A. Brodie, Deputy Public Prosecutor, for respondent.

Terrell, Ag. C.J.—This was an appeal by the accused who was found guilty of an offence under section 324 of the Penal Code and sentenced to a fine of $75 or one month's rigorous imprisonment. The eighth ground of appeal alleges that the accused's counsel was never given an opportunity of addressing the Court at the close of the case. This is admitted by the learned Deputy Public Prosecutor and constitutes a serious irregularity. In view of this there is no necessity to enter into the merits of the conviction. The appeal will be allowed, the conviction set aside and a new trial ordered.

Appeal allowed. New trial ordered.

SELVARATNAM vs. P. P.

[App. Cr. Juris. (Terrell, Ag. C.J.) May 6, 1941]

Bankruptcy offence—Award of imprisonment—Rigorous or simple imprisonment.

In the absence of exceptional circumstances a sentence of simple and not rigorous imprisonment is the usual punishment for an offence under the Bankruptcy Enactment (Cap. 55).

In this case the appellant was charged with failing to disclose in his statement of affairs a debt of $1,712 thereby committing an offence under section 102 (f) of the Bankruptcy Enactment (Cap. 55). He was convicted and sentenced to undergo a term of three weeks rigorous imprisonment.

On appeal the sentence was varied by substituting simple imprisonment for rigorous imprisonment.

R. P. S. Rajasooria for appellant.

W. M. McCall, Deputy Public Prosecutor, for respondent.

Terrell, Ag. C.J.—The appellant was found guilty of an offence under the Bankruptcy Enactment, in failing to disclose all his liabilities in his statement of affairs. There is no question that the omission was deliberate and not through inadvertence. The appellant was therefore properly convicted. It is however unusual to award rigorous imprisonment, unless the circumstances are exceptional. The sentence is accordingly varied, and simple imprisonment substituted.

It appears that the appellant is a dresser in a Government hospital. I see no reason myself why he should not be just as well qualified for his work after his imprisonment for a bankruptcy offence as he was before. I appreciate, however, that this is a matter for the head of his department.

Conviction confirmed. Sentence varied.